



Decision and Reasons for Decision

Application Number: 210820

Applicant: Mr P Jackson

Respondent: Department of Health

Decision Date: 10 February 2010

Catchwords: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER CONCERNING CERTAIN OPERATIONS OF AGENCIES – applicant sought access to findings of an investigation into grievances lodged by him – whether disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency’s personnel – whether disclosure would, on balance, be in the public interest

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REASONS FOR DECISION

Summary

1. The applicant, an employee of the Department of Health (also known as Queensland Health) (**QH**), seeks access to information concerning six categories of documents related to his employment.
2. For the reasons set out below, I find that the relevant matter in issue does not qualify for exemption from disclosure under section 40(c) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

3. By letter dated 12 November 2008 (**FOI Application**), the applicant requested access to six categories of documents under the FOI Act.
4. By letter dated 8 January 2009 (**Initial Decision**), QH advised the applicant that it had located a number of documents relating to the FOI Application and had decided to:
 - grant access to a range of documents
 - refuse access to some documents in accordance with section 44(1) of the FOI Act.
5. By letter dated 30 January 2009, the applicant applied for internal review of the Initial Decision.
6. By letter dated 5 March 2009 (**Internal Review Decision**), QH advised the applicant that it had decided to vary the Initial Decision by releasing further documents to him but affirmed the Initial Decision in relation to the remainder of the relevant documents.
7. By letter dated 29 March 2009, the applicant applied to the Office of the Information Commissioner (**Office**) for external review of the Internal Review Decision.

Decision under review

8. The decision under review is the Internal Review Decision dated 5 March 2009 which is referred to at paragraph 6 above.

Steps taken in the external review process

9. By email on 2 April 2009, the Office requested that QH provide a number of initiating documents relevant to the review.
10. By letter dated 3 April 2009, the Office advised the applicant that the Internal Review Decision would be reviewed.
11. By letter dated 3 April 2009, the Office advised QH that the Internal Review Decision would be reviewed and requested that it also provide a copy of the documents responsive to the FOI Application.
12. By letter dated 9 April 2009, QH provided the requested documents.

13. During the course of this external review, Mr Ex of the Office contacted the applicant and QH on various occasions in an attempt to informally resolve the issues on external review. Both parties provided information to the Office during that process.
14. By letter dated 11 May 2009, the applicant provided submissions in support of his case.
15. By letter dated 12 May 2009, a third party advised the Office that they did not object to disclosure of the matter in issue which related to their involvement in the grievance process.
16. By email on 26 May 2009, QH provided information in support of its case.
17. By letters dated 14 August 2009, the parties were advised that the review would proceed to formal determination and both parties were invited to provide written submissions to the Office on the application of section 40(c) of the FOI Act to the matter in issue.
18. By letter dated 27 September 2009, QH provided submissions in support of its case that the matter in issue in this review is exempt from disclosure under section 40(c) of the FOI Act.
19. The applicant did not provide any further submissions in support of his case in relation to the application of section 40(c) of the FOI Act.
20. On 27 November 2009, a staff member of this Office contacted the third party to confirm that they had no objection to disclosure of the matter in issue as it related to their involvement in the grievance process. The third party confirmed that they did not object to disclosure of that information to the applicant.
21. By letter dated 30 November 2009, I advised QH of the preliminary view that the relevant documents are exempt from disclosure under section 44(1) and section 40(c) of the FOI Act with the exception of:
 - a brief summary of the outcome of the grievance initiated by the applicant
 - information relating to the third party's involvement in the grievance process.

I invited QH to provide submissions in support of its case by 15 December 2009 if it did not accept the preliminary view.

22. By letter dated 21 December 2009, I advised the applicant of the preliminary view and asked him to provide submissions in support of his case by 8 January 2010 if the view was not accepted.
23. By email dated 21 December 2009, QH advised that:
 - it accepted the preliminary view in relation to information relating to the third party's involvement in the grievance process
 - it maintained its objection to disclosure of information relating to the outcome of the grievance initiated by the applicant for the reasons previously provided to the Office.
24. By letter dated 13 January 2010, I wrote to QH to:

- reiterate the reasons for my preliminary view concerning the findings in relation to the applicant's grievance
 - invite QH to specifically address those reasons and to provide any additional submissions on those issues by 20 January 2010.
25. QH did not provide any further submissions in support of its case.
26. In making my decision in this review, I have considered the following:
- the terms of the FOI Application
 - the Initial Decision and Internal Review Decision
 - the applicant's internal review application and external review application
 - information the applicant provided by telephone on 6 May 2009, 11 May 2009, 28 July 2009 and 7 September 2009
 - information QH provided by telephone on 6 May 2009, 26 May 2009, 16 June 2009, 21 July 2009, 12 August 2009, 17 September 2009 and 18 November 2009
 - the applicant's written submissions dated 11 May 2009
 - QH's written submissions dated 9 April 2009, 21 May 2009, 26 May 2009, 29 June 2009, 27 September 2009 and 21 December 2009
 - the matter in issue
 - previous decisions of the Information Commissioner
 - the relevant provisions of the FOI Act.

Matter in issue

27. A number of issues in this review have been informally resolved. The remaining issue for determination is whether the matter in issue is exempt from disclosure under section 40(c) of the FOI Act.
28. The matter in issue in this review (**Matter in Issue**) can be described as a summary of findings made in respect of a grievance lodged by the applicant as it appears in folios 14 and 47 of the relevant investigation report (**Investigation Report**).¹

Relevant submissions

The applicant's submissions

29. By letter dated 11 May 2009, the applicant made the following general submissions in support of his case:

I repeat that I was given no outcomes to my official Grievance complaint. ... There are problems with the way managers handle complaints in the public health arena, the way investigations are carried out and the way those targeted by harassment are given little support. The system needs to be changed and managers held accountable for their actions. ... At a bare minimum I believe in the interests of natural justice I would be allowed to have the conclusion of the investigation and parts related to me. I think I would be entitled to know the recommendations of the [Investigation Report] in regard to my complaints. I would like to know if the investigator substantiated my complaints. To provide some closure I would like to know that QH acted as a responsible employer to ensure such harassment does not occur again to staff or enacted methods to minimise it.

¹ I have provided QH with a copy of the Matter in Issue in this review.

The agency's submissions

30. I have summarised QH's relevant submissions on the general application of section 40(c) of the FOI Act to the Matter in Issue in the following manner:

Substantial adverse effect on the management of QH's personnel

- The Matter in Issue consists of information gathered or prepared as part of an investigation into numerous allegations made by certain staff members about several of their colleagues from a particular unit. These allegations covered a wide range of both personal and work-related issues.
- The Matter in Issue contains information communicated in confidence by a number of staff members from the unit, in which they expressed concerns about certain clinical practices, staff relationships and administration practices that were negatively affecting the facility. This information was provided on the basis that it would remain confidential and would not be disclosed to any other employee either involved in this investigation or from the unit.
- As a result of these allegations, a hostile work environment developed together with a number of acrimonious relationships between certain employees. As the unit is a small Aged and Residential Care Centre, any further animosity between staff would create enormous disruption within the facility which may in turn affect the clinical care that is provided to residents.
- The other employees who were involved in the investigation have a genuine expectation that the information that they provided will not be disclosed to any other person (especially someone who does not have any direct involvement in the matter).
- Release of the information would have a substantial effect on QH's ability to effectively manage staff at the unit in particular and more generally within the district in which that facility is located for the following reasons:
 - It would significantly impact on employees' willingness to fully cooperate and participate in the necessary human resource processes and therefore would affect QH's ability to manage and resolve such situations in the future.
 - It would have a significant and unsettling effect on workplace harmony within the unit and on the relationships amongst employees which in turn would affect management's ability to successfully manage staff within the facility.
- Other considerations include:
 - QH is required to manage its workforce effectively to ensure the efficient working of numerous health care facilities and services.
 - It is critical (especially in small health care facilities) that staff have confidence in the processes established to facilitate the management and assessment of staff and their operations.

- Staff must be able to freely seek, receive and document advice relating to staff management issues in order to ensure that appropriate and necessary remedial action can be taken when required.
- Any release of documents generated with the express understanding of confidential treatment of matters reported on by individual staff members could reasonably be expected to have a substantial adverse effect on the management or assessment by QH of its personnel.
- The ability of QH to manage workplace issues, including cooperation in ongoing investigations would be compromised if staff (including management) felt that their duty to report, provide comment on and / or follow up on matters of importance would be circumvented by the later release of any statements, reports or comments initially provided in an atmosphere of expected confidentiality.
- Disclosure has the potential to provoke further hostility in an already volatile work environment which is presently showing gradual signs of settling.
- All staff involved in the workplace matters to which the Matter in Issue relates continue to work within the same health service district.

Public interest considerations

- There is a general right to seek access to documents under the FOI Act held by QH and there is also a public interest in maintaining the integrity of QH's decision making processes particularly in relation to the management of staff and the resolution of disputes.
- There is a substantial public interest in ensuring that QH conducts its human resource management responsibilities in an appropriate way, consistent with 'best practice' in the broader community, however, weighed against that interest is the public interest in ensuring that the privacy interests of the individual staff members involved are adequately respected.
- Given the above and the fact that the staff members involved in this matter continue to work within the same health service district, the greater public interest lies in ensuring, as far as possible, the confidentiality arising from the personal disclosures by the staff as well as the preservation of the integrity and effectiveness of the methods and processes employed by QH for managing its large workforce.
- Disclosure of the Matter in Issue would undermine the public interest in maintaining the continued supply of information about the competencies and workplace behaviour of employees via the relevant channels within the department.
- Other considerations include:
 - In the interests of procedural fairness and natural justice, the applicant has already been provided with information relating to the allegation that was made against him.

- The documents to which the applicant have been refused access relate to the other allegations that formed part of the investigation.
- The other employees who were involved in this investigation have a genuine expectation that the information that they provided will not be disclosed to any other person.

The law

31. Section 40(c) of the FOI Act provides:

40 Matter concerning certain operations of agencies

Matter is exempt matter if its disclosure could reasonably be expected to—

...

- (c) *have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or*

...

unless its disclosure would, on balance, be in the public interest.

32. The focus of this exemption provision is on the management or assessment by an agency of the agency's personnel. The exemption will be made out if it is established that disclosure of the matter in issue could reasonably be expected to have a substantial adverse effect on the management or assessment by the respondent of its personnel, unless disclosure of the matter in issue would, on balance, be in the public interest.

'Could reasonably be expected to'

33. In *Attorney-General v Cockcroft*,² the Federal Court interpreted the phrase '*could reasonably be expected to prejudice the future supply of information*' in the context of the equivalent business affairs exemption in the Commonwealth FOI Act.³ In *Cockcroft*, Bowen CJ and Beaumont J provided the following guidance on interpretation of that phrase:⁴

In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see Jason Kioa v. The Honourable Stewart John West, High Court, unreported, 18 December 1985 per Mason, J. at p 36; see also per Gibbs, C.J. at p 12).

² (1986) 64 ALR 97 (**Cockcroft**).

³ Section 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth)

⁴ *Cockcroft* at 106.

34. The Justices' interpretation of the phrase '*could reasonably be expected to*' and the proposed line of inquiry, while made in the context of the Commonwealth FOI Act, is relevant to the interpretation of section 40(c) of the FOI Act. Shepherd J also noted in *Cockcroft* that it is not necessary for a decision-maker '*to be satisfied upon a balance of probabilities*' that disclosing the document will produce the anticipated prejudice.
35. Accordingly, the phrase '*could reasonably be expected to*' in section 40(c) of the FOI Act requires a consideration of whether the expectation that disclosure of the matter in issue could have a substantial adverse effect on the management or assessment by an agency of the agency's personnel is reasonably based.

'Substantial adverse effect'

36. In *Cairns Port Authority and Department of Lands*⁵ the Information Commissioner considered the phrase 'substantial adverse effect' as it appears in the various provisions of the FOI Act and said:⁶

In my opinion, no such doubt attends the correct interpretation of the phrase "substantial adverse effect" where it appears in the Queensland FOI Act (notably in s.49, s.40(c), s.40(d) and s.47(1)(a)). Its meaning is made clear by its contrast with the phrase "adverse effect" in s.45(1)(c), where the adjective "substantial" does not appear. The legislature must have intended an adverse effect under s.45(1)(c) to be one that is "real" or "actual" or "having substance, not illusory". Thus, where the legislature has employed the phrase "substantial adverse effect", it must in my opinion have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.

Public interest considerations

37. The words 'public interest' are not specifically defined and generally refer to considerations affecting the good order and functioning of community and the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.

Findings

Substantial adverse effect

38. I acknowledge that QH is primarily concerned that disclosure of the Matter in Issue will:
- provoke further hostility in an already volatile work environment which is presently showing gradual signs of settling
 - make staff reluctant to cooperate in future investigations and/or compromise their duty to report, provide comment on and / or follow up on matters of importance
 - make staff lose confidence in the processes for the investigation and resolution of grievances.
39. While I accept that the work environment of the unit has previously been volatile and QH is concerned about staff cooperation in future investigations, I consider the following considerations are relevant:

⁵ (1994) 1 QAR 663.

⁶ At paragraph 150.

- The applicant no longer works in the unit.
 - The relevant events which led to the hostile working environment occurred some time ago (i.e. in 2007 and early 2008).
 - The Matter in Issue is not detailed and does not reveal information provided by other employees during the course of the investigation, nor does it relate to grievances lodged by other employees.
 - The Matter in Issue is limited to a summary of outcomes in respect of the five allegations made by the applicant.
40. In light of the matters set out immediately above, I am not satisfied that disclosure of the Matter in Issue to the applicant could reasonably be expected to:
- provoke further hostility in the relevant unit or make staff reluctant to cooperate in future investigations
 - have an adverse effect on its management or assessment of its personnel is reasonably based.

Public interest considerations

41. Whilst not strictly necessary (given my findings set out above), I will briefly address the public interest considerations favouring disclosure.
42. In *Pemberton and The University of Queensland*⁷ the Information Commissioner noted that a legitimate category of public interest is the public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies and explained that:

In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.

43. Also of relevance is the decision of *Villanueva and Queensland Nursing Council; A Midwife (Third Party); Talbot (Fourth Party); Gordon (Fifth Party)*⁸ concerned a complaint about a midwife's conduct in delivering the applicant's baby. The matter was investigated by the Queensland Nursing Council (**QNC**) but no disciplinary action was taken. In that case the Information Commissioner noted that as the complainant, the applicant had a special interest in scrutinising the investigation and the information gathered by the QNC, upon which the QNC's decision to take no action was based. The Information Commissioner said:⁹

⁷ (1994) 2 QAR 293 (*Pemberton*) at paragraph 190.

⁸ (2000) 5 QAR 363 (*Villanueva*).

⁹ At paragraph 141.

It remains the case that the applicant's complaint against the midwife was, in effect, dismissed by the QNC, and that she has not been provided with a sufficient explanation as to why that decision was reached. The extent of the detail that is offered by way of explanation in such circumstances will necessarily vary from case to case, depending on the need to respect any applicable obligations or understandings of confidence, or applicable privacy considerations. Subject to any such constraints, I consider that there is a legitimate public interest in a complainant being given sufficient information to be satisfied that the investigating body has conducted a thorough investigation and reached a fair and realistic decision about whether the available evidence was sufficient or insufficient to justify any formal action being taken in respect of the complaint.

42. In accordance with the principles set out in *Pemberton* and *Villanueva*, I consider that in this case there is significant public interest in the complainant being given an adequate explanation of the outcome of the grievance which he initiated.
43. During the course of this external review, QH advised that it had written to the applicant about the investigation of his grievance and provided me with a copy of that letter.
44. I have carefully considered the content of this letter and note that it does not provide the applicant with the grievance investigation findings, decision or reasons for decision.
45. I note the applicant's submission that he:
 - is unaware of whether any parts of his grievance were substantiated
 - has not been advised of the outcome of the investigation into his grievance.
46. I also note clause 7.3.7 of QH's Integrated (HR / IR) Resource Manual IRM 3.5 - '*Grievance Resolution and EB6 Grievance Settling; and Industrial Disputes*' (**Grievance Resolution Policy**) which provides:

7.3. Action required by delegate upon receipt of a formal grievance

...

7.3.7. At the end of an investigation, the authorised delegate must provide the parties to the grievance with a written copy of the grievance investigation findings, decision and reasons for the decisions.

...

47. On the information currently before me, I consider that the public interest favours the applicant being provided with sufficient detail about the outcome of the investigation into the grievance lodged by him, which I note is wholly consistent with clause 7.3.7 of the relevant QH Grievance Resolution Policy.

DECISION

48. For the reasons set out above, I find that the Matter in Issue is not exempt from disclosure under section 40(c) of the FOI Act.
49. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Henry
Date: 10 February 2010